No. 92-796

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

WILLIAM N. ODOM, JR.,

Petitioner,

v.

GEORGE T. LEWIS; CHARLES G. BLACK; J. J. HENRY; JOHN C. ROBERTSON; MICHAEL B. VAUGHN; RUBY I. MILLER; LILLIAN V. WALLS; SHELBY COUNTY GOVERNMENT; and STATE OF TENNESSEE,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Dissatisfied with Petitioner's Questions Presented for Review, these Respondents submit that the Question Presented for Review is whether the District Court erred in dismissing the Complaint against the Respondents, J. J. Henry, John C. Robertson, and Shelby County Government.

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BRIEF IN OPPOSITION

SUMMARY OF THE ARGUMENT

1. The issue in this case is not whether a *pro se* citizen has the right to seek relief in the Federal Courts for an alleged constitutional violation. The issue in this case is whether the Complaint states a claim upon which relief can be granted.

2. The Complaint was filed on February 23, 1989, against a Chancellor, the Chancery Court Clerk, a

deputy sheriff, Shelby County, the State of Tennessee, three private citizens and their attorney. The Complaint contains conclusory allegations of a conspiracy to violate Petitioner's civil rights under 42 U.S.C. §§ 1983, 1985, and 1988, and seeks monetary damages. The Complaint stems from a Chancery Court suit for outrageous conduct and injunctive relief. The Complaint alleges that Chancery Court did not have subject matter jurisdiction. An injunction was issued in the Chancery suit which Petitioner violated. The Petitioner was found in contempt of court and was sentenced to ten (10) days in the Shelby County Correction Center and was also ordered to pay a judgment of $30,000. Petitioner appealed to the Tennessee Court of Appeals, which ruled that Chancery Court did not have jurisdiction because the claim sought unliquidated damages. The Chancery suit was remanded for further proceedings.

3. At all times material thereto, Respondents, Robertson and Henry, were acting in their official capacities and were entitled to either a judicial, quasi judicial, or good faith immunity. It is well settled that "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or Constitutional rights of which a reasonable person would have known". Sheriffs and their deputies are immune when serving process at the direction of a court, so long as the writ or process appears valid on its face.

4. Shelby County is not a legal entity subject to suit and is not a "person" under 42 U.S.C. §1983 and does not fall within the exception established in the *Monell* case. There are no factual allegations in

the Complaint which establish that the County had a custom or policy to discriminate.

5. There are no allegations in the Complaint which show a class-based invidiously discriminatory animus behind the alleged conspirators' actions. It is well established that conclusory allegations of conspiracy, such as those set forth in the Complaint, unsupported by any factual assertions, will not withstand a motion to dismiss, even if the conspiracy claims are filed by a *pro se* plaintiff.

6. The Complaint was filed on February 23, 1989, and is barred by the Tennessee one (1) year Statute of Limitations contained in T.C.A. § 28-3-104. The last alleged overt act of any of the alleged conspirators occurred on November 2, 1987, when Petitioner posted collateral to secure his right to appeal the Chancery Court decision to the Tennessee Court of Appeals.

ARGUMENT

These Respondents submit that the Court of Appeals was correct in affirming the action of the District Court in dismissing Petitioner's claim for damages. In its Order, the Court of Appeals stated as follows:

> Upon review, we conclude that the District Court properly determined that Odom failed to state a claim. Construing the Complaint in the light most favorable to Odom and accepting his factual allegations as true, we determine that Odom undoubtedly can prove no set of facts in support of his claims that would entitle him to relief. (Citation omitted).

1. Question Presented for Review:

The issue in this case is not whether a *pro se* citizen has the right to seek relief in the Federal Courts for an alleged Constitutional violation. The issue in this case is whether Odom's Complaint states a claim upon which relief can be granted. Odom states at page 6 of his Petition that:

> The rulings in this matter made by the United States District Court for the Western District of Tennessee, Western Division, and the United States Court of Appeals for the Sixth Circuit would allow no *pro se* citizen under their jurisdiction to have access to the federal courts.

Odom cites *Haines v. Kerner, et al.*, 404 U.S. 519 (1972) as authority for this statement. This case held only that *Haines'* Complaint contained sufficient factual allegations to justify an opportunity to offer proof. Such is not the case with Odom's Complaint. Odom does not state sufficient facts to justify an opportunity to offer proof. The District Court never ruled that a *pro se* citizen did not have a right to seek relief in the Federal Courts.

2. Allegations in Complaint:

It is material to the consideration of the question presented in this case to review Odom's allegations in the Complaint in detail. The Complaint was filed on February 23, 1989, against a Shelby County Chancellor, George T. Lewis ("Lewis"); the Shelby County Chancery Court Clerk, John C. Robertson ("Robertson"); a Shelby County Deputy Sheriff, J. J. Henry ("Henry"); Shelby County Government ("the County"); State of Tennessee ("the State"); three pri-

vate citizens, Michael B. Vaughn ("Vaughn"), Ruby I. Miller ("Miller") and Lillian V. Walls ("Walls"); and their attorney, Charles G. Black ("Black").

Odom's civil rights claim stems from Vaughn's Chancery Court action for outrageous conduct and injunctive relief filed by Black. The nature of the Chancery Court action as set forth in the Complaint is as follows:

Prior to 1984, Vaughn had been in Bankruptcy, and Walls and Miller were his self-appointed financial trustees. On or about August 20, 1984, Vaughn and his children moved into a house located at 829 Freeman Street, Memphis, Tennessee, which was located next door to Odom's house. Shortly after Vaughn moved into said house, he and Odom entered into a homosexual relationship and Odom began to pay extra expenses of Vaughn. Odom lived in his house with his wife and two sons. On or about November 14, 1984, Odom told his wife of his relationship with Vaughn, and Odom's wife moved out of the house and sued for divorce.

On or about September 1, 1985, Vaughn learned that Odom's wife was going to subpoena him as a witness in her divorce proceedings. Vaughn asked Odom to settle out of Court so that Vaughn would not be forced to testify about the homosexual relationship. Odom and Vaughn argued, and Odom told Vaughn that if he was asked about the homosexual relationship during the divorce trial, he would admit to it. Vaughn told Odom that he would deny it and it would be his word against Odom's. Vaughn had previously denied to his family that he and Odom were engaged in a homosexual relationship.

Odom threatened to tell Vaughn's family and employer about their affair and taped a conversation between himself and Vaughn wherein sexual matters were discussed. Odom's divorce trial had been scheduled to start on March 1, 1986, and Vaughn was served with a subpoena to appear as a witness. On or about February 6, 1986, Black filed Vaughn's Complaint in Chancery Court for outrageous conduct and injunctive relief. The Complaint was assigned to Lewis' Court. Black requested a Temporary Restraining Order to prohibit Odom from carrying out his threats and to require Odom to deliver the tapes to Lewis. Lewis granted Black's Motion for a Temporary Restraining Order which was issued on February 7, 1986.

On or about February 7, 1986, Odom was called to an office on the main floor of the U. S. Post Office in Memphis, Tennessee, at which time Henry served Odom with the Temporary Restraining Order. Odom asked Henry where he should sign and Henry stated that Odom need not sign; whereupon Odom turned and walked out of the office as Henry started to write on a paper. Henry never read to Odom nor served Odom with a copy of the Temporary Restraining Order. The Temporary Restraining Order was brought to Odom some fifteen (15) minutes later in a sealed post office envelope by a post office clerk. Odom violated the Order on February 7, 1986, by carrying out his threats to tell Vaughn's family and employer about the homosexual relationship.

On or about February 19, 1986, Black filed an Amended Complaint asking that Odom be found in contempt of Court, and also asking for $250,000 damages. On February 20, 1986, Odom, through his

attorney of record, filed a Motion challenging Chancery Court jurisdiction. On March 27, 1986, Lewis denied Odom's Motion, and on May 21, 1986, denied Odom's request for an Interlocutory Appeal.

The Chancery Court trial was held on December 8, 1986, and Lewis found that Odom violated the Temporary Restraining Order and was guilty of outrageous conduct. Lewis awarded Vaughn a Judgment of $30,000 and sentenced Odom to ten (10) days in the Shelby County Correction Center for contempt of Court. On January 5, 1987, Odom entered the Shelby County Correction Center and served ten (10) days.

On or about March 16, 1987, Odom filed a Notice of Appeal and was required by Robertson, as a Special Chancellor, to give a Deed of Trust for his property at 857 Bowen Circle, in order to appeal. On or about November 2, 1987, Odom was required to pledge additional collateral of $25,000, which represented a partial distribution of his aunt's estate. On or about February 26, 1988, the Court of Appeals of Tennessee, reversed the Judgment. On or about January 4, 1989, Black, refiled Vaughn's suit in the Circuit Court of Shelby County, Tennessee, where it is still pending.

3. Robertson and Henry possess either judicial, quasi judicial, or good faith immunity which bars Odom's damage claims against them.

Robertson and Henry are both governmental officials of Shelby County, Tennessee, and were at all times relevant thereto acting in their official capacities with regard to all allegations made by Odom. As such, they are entitled to either a judicial, quasi judicial or good faith immunity. *Panko v. Rodack*, 606 F.2d 168 (7th Cir. 1979), cert. den., 444 U.S. 1081,

100 S.Ct. 1034, 62 L.Ed.2d 765 (1980); *Seldon v. Goodman*, 487 F.Supp. 30 (S.D. N.Y. 1980); *Raitport v. Provident Natl. Bank*, 451 F.Supp. 522 (E.D. Pa. 1978).

The only factual allegations in the Complaint regarding Robertson are: he was the Chancery Court Clerk; he assigned Vaughn's suit to Lewis; and he required Odom to post an appeal bond. Black's suit was filed in Chancery Court and it was assigned to Lewis in a routine and normal manner. There are no allegations of any improper motive in the case being assigned to Lewis. Cases must be assigned or the judicial process would cease to function. It is absurd for Odom to contend that the assignment of a suit can be the basis of a civil rights violation. The same can be said of the allegation that Robertson required an appeal bond. Appellate procedure is set by state law and the Clerk is merely following the law by requiring an appeal bond.

The only factual allegations in the Complaint regarding Henry are: he was a Deputy Sheriff; and he served Odom with a copy of the Complaint. Odom alleges that Henry did not read or deliver the Temporary Restraining Order to him. However, Odom alleges that he walked out of the office while Henry was attempting to serve the Order, and alleges that the Order was later delivered to him by a Post Office employee. Odom alleges that the Order was not read or delivered to him because he walked out during the service process. Odom alleges that he received the Order, which he apparently read because he admits to violating the Order.

It is well settled that "government officials performing discretionary functions generally are shielded

from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818; 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). *See, Hall v. Medical College of Ohio at Toledo*, 742 F.2d 299, 307, 308 (6th Cir. 1984), *cert. den.*, 105 S.Ct. 796 (1985); *Hall v. United States*, 704 F.2d 246, 249, 251 (6th Cir. 1983), *cert. den.*, 464 U.S. 1002 (1983).

The typical Court Clerk performs "ministerial" rather than "judicial" functions and is entitled to a qualified immunity. *Marty's Adult World, Inc. v. Guidia*, 453 F.Supp. 810 (D.C. Conn. 1978); *Barnes v. Dorsey*, 480 F.2d 1057 (8th Cir. 1973); *Norwood v. Solomon*, 431 F.Supp. 380 (E.D. Mo. 1977); *McGhee v. Moyer*, 60 F.R.D. 578 (D.C. Va. 1973); *Morrison v. Jones*, 607 F.2d 1269 (9th Cir. 1979); *Lowe v. Letsinger*, 772 F.2d 308 (7th Cir. 1985).

Sheriffs and their deputies, as well as constables and marshals, are immune when serving process at the direction of a court, so long as the writ or process appears valid on its face. *Gigliotti v. Redevelopment Authority of New Castle*, 362 F.Supp. 764 (W.D. Pa. 1973), *aff'd. without opinion*, 492 F.2d 1238 (1974); *Thompson v. Baker*, 133 F.Supp. 247 (D.C. Ark. 1955); *Toscano v. Olesen*, 189 F.Supp. 118 (S.D. Cal. 1960); *Winterhalter v. Three Rivers Motors Co.*, 312 F.Supp. 962 (W.D. Pa. 1970).

4. The County is not a legal entity subject to suit, and is not a "person" under 42 U.S.C. § 1983, and is immune from liability.

The County is not a legal entity subject to suit, and is not a "person" under 42 U.S.C. § 1983, and does not fall within the exception established in *Mo-*

nell v. Department of Social Services, 436 U.S. 658 (1978).

The only factual allegations in the Complaint regarding the County are: it oversaw the management and funding of the Shelby County Sheriff's Department and Election Commission and paid its employees, including Henry. There are no factual allegations which establish that the County had a custom or policy to discriminate against Odom because of his homosexuality, or to deny him due process or a fair trial. Absent such allegations, the County does not fall within the *Monell* exception.

Since no custom or policy is factually alleged, the County cannot be liable for the acts of its employees, because the doctrine of *respondeat superior* does not apply in Civil Rights cases. *Monell, supra*; *Jennings v. Davis*, 476 F.2d 1271 (7th Cir. 1973); and *Adams v. Pate*, 445 F.2d 105 (7th Cir. 1971).

5. Odom's claim that the Respondents conspired to deprive him of his Constitutional Rights is devoid of any factual foundation and thus fails to state a claim upon which relief can be granted.

Odom claims a violation of 42 U.S.C. § 1985. The only provision of § 1985 with any potential applicability to this case is § 1985(3) which provides for safeguarding "the equal protection of the laws, or of equal privileges and immunities under the laws."

So long as there is a class-based invidiously discriminatory animus behind the conspirators' action, § 1985(3) can be used to protect deprivation of rights owing their existence to the equal protection clause of the Fourteenth Amendment, the due process clause of that Amendment, the privileges and immunities

clauses of Article Four and the Fourteenth Amendment, to federal treaties and to federal statutes. *Cohen v. Illinois Institute of Technology*,524 F.2d 818 (7th Cir. 1975), *cert. den.*, 425 U.S. 943 (1976); *Studen v. Beebe*, 588 F.2d 560, 564 (6th Cir. 1978). Odom has not alleged facts to indicate that there is a racial, or otherwise class-based animus behind the alleged conspirators' actions. Thus, no claim has been stated under 42 U.S.C. § 1985(3).

It is well established that conclusory allegations of conspiracy such as those set forth in Odom's Complaint, unsupported by any factual assertions, will not withstand a motion to dismiss even if the conspiracy claims are filed by a pro se plaintiff. Factual allegations in support of such a claim are required. *Briscoe v. LaHue*, 663 F.2d 713, 723 (7th Cir. 1981), *aff'd. on other grounds*, 460 U.S. 325, 103 S.Ct. 1108, 75 L.Ed.2d 96 (1983). *See also*, *Gutierrez v. Lynch*, 826 F.2d 1534, 1538, 1539 (6th Cir. 1987); *Chapman v. City of Detroit*, 808 F.2d 459, 465 (6th Cir. 1986); *Jaco v. Bloechle*, 739 F.2d 239, 245 (6th Cir. 1984).

Odom is apparently attempting to base his alleged civil rights claim on Lewis' lack of jurisdiction. However, Odom has alleged no facts to show that the judicial acts by Lewis were clearly outside the scope of his jurisdiction. The most that can be said is that Lewis misinterpreted a State Statute, T.C.A. § 16-11-102, when he denied Odom's Motion challenging jurisdiction. An error of law does not constitute a civil rights violation. A judge's ruling on a motion is clearly judicial in nature and is not subject to review under § 1983 because of absolute immunity for such an action. *Houghton v. Osborne*, 834 F.2d 745 (9th Cir. 1987). Therefore, even if Odom had alleged sufficient

facts to establish a conspiracy, the alleged conspiracy (lack of jurisdiction) would not establish a§ 1983 claim.

6. Odom's action is barred by the applicable Statute of Limitations.

Odom's suit, which was filed on February 23, 1989, fails to state a claim because it is barred by the Statute of Limitations. Since 42 U.S.C. § 1983 does not contain a Statute of Limitations, the Court must look to the most appropriate state law pursuant to 42 U.S.C. 1988. For claims arising in Tennessee, the most appropriate statute is the one (1) year limitation contained in T.C.A. § 28-3-104. *See, Mulligan v. Schlachter*, 389 F.2d 231, 233 (6th Cir. 1968), cited with approval in *Carmicle v. Weddle*, 555 F.2d 554, 555 (6th Cir. 1977); *Sevier v. Turner*, 742 F.2d 262, 272 (6th Cir. 1984). However, the question of when a federal cause of action accrues is a matter of federal, not state law. *Fiesel v. Board of Education*, 675 F.2d 522 (2nd Cir. 1982). A cause of action under § 1983 accrues when the plaintiff knows, or has reason to know, of the injury which is the basis of the action. *Sevier*, at p. 273. The Statute begins to run at the time the plaintiff knows of the discriminatory act, not at the point when the consequences of the act become painful. *Chardon v. Fernandez*, 454 U.S. 6, 70 L.Ed.2d 6, 102 S.Ct. 28 (1981), *reh. den.*, 71 L.Ed.2d 322, 102 S.Ct. 1042 (1982).

In the case at bar, the District Court ruled that the final act alleged by Odom occurred on November 2, 1987, when he posted collateral to secure his right to appeal. This suit was filed on February 23, 1989.

Odom's contention that the Statute did not start to run until February 25, 1988, when the Court of

Appeals ruled that Chancery Court did not have jurisdiction is not well taken. His contention in this regard is similar to the plaintiff's contention in *Sevier*, p. 272, wherein the plaintiff contended that the Statute did not begin to run until his attorney informed him that he possessed a federal claim. The Court rejected this contention and ruled that the Statute commenced to run when the plaintiff knew of the injury. Odom knew of his injury on November 2, 1987, when he posted collateral to secure his right to appeal. This date is also the last alleged overt act of any of the alleged conspirators. Therefore, this suit is time barred by T.C.A. § 28-3-104.

Rule 10 of this Court provides as follows:

> .1. A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.
>
> (a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.
>
> (b) * * *

> (c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

* * *

The Petition for Writ of Certiorari fails to state any of the reasons set forth in Rule 10 which would justify the granting of the writ. The decision of the Court of Appeals is not in conflict with the decision of another federal court of appeals on the same question, and is not in conflict with a state court of last resort. The Court of Appeals has not so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision. The questions presented are not important questions of federal law which have not been settled, and the decision of the Court of Appeals is not in conflict with applicable decisions of this Court. In summary, the Petition fails to state any reason whatsoever which would justify the granting of the writ.

CONCLUSION

WHEREFORE, AND FOR ALL OF WHICH, the Respondents, J. J. Henry, John C. Robertson and Shelby County Government respectfully request that the Petition for Writ of Certiorari be denied.

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